STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Saunders V. Dorsey, P 29761,

Respondent/Appellee,

Case Nos. 02-118-AI; 02-121-JC

Decided: July 1, 2005

Appearances:
Cynthia C. Bullington, for the Attorney Grievance Commission.
Richard L. Cunningham, for the respondent.

BOARD OPINION

The Grievance Administrator has petitioned for review of the hearing panel order suspending the respondent's license to practice law for 30 months, with a requirement of continuing legal education, on the grounds that there are insufficient mitigating factors in the record below to warrant the imposition of discipline less than revocation under Standard 5.1 of the American Bar Association's Standards for Imposing Lawyer Sanctions. We agree. Consequently, the hearing order of suspension with condition entered November 23, 2004 is vacated and the respondent's license to practice law in Michigan is revoked.

I. Hearing Panel Proceedings

The Grievance Administrator filed a judgment of conviction under the procedure described in MCR 9.120(B)(3) which established that the respondent was convicted in the United States District Court, Eastern District of Michigan, of criminal contempt of court, aiding and abetting, in violation of 18 U.S.C. 401(1) and (2). The respondent pled guilty to that federal felony on June 6, 2002. On October 3, 2002, he was sentenced to a term of 21 months imprisonment and a fine of $10,000.00.

This discipline proceeding was commenced October 25, 2002. Tri-County Hearing Panel #28 conducted hearings on August 27, 2003, January 22, 2004 and May 26, 2004. (The respondent's license was automatically suspended on October 3, 2002, the date of his conviction. The Attorney Discipline Board denied his petition for a stay of discipline. Proceedings before the panel were held in abeyance for a period of time by stipulation of the parties.)

In its report filed November 23, 2004, the hearing panel summarized respondent's crime:

> To help a former client who wanted to purchase real estate, respondent arranged for the opening of a bank account funded with proceeds from the former client's drug trafficking. The property was purchased and, within a short time, the United States successfully brought forfeiture proceedings. On behalf of the former client's wife, and to forestall the forfeiture and eviction, respondent caused several pleadings to be filed in federal court; these included a motion for an order to stay the final order of forfeiture, a brief in support, and a notice of appeal. Respondent admitted that he signed another attorney's name to these pleadings, knowing that the other attorney had not authorized the signature. These facts were not contested during the proceedings in this matter; indeed, respondent admitted that there were multiple, fabricated documents involved in the transaction. [Hearing Panel Report p. 3.]

Additional detail concerning the nature of the respondent's conduct is found in the Rule 11 Plea Agreement in the federal criminal case (Petitioner's Exhibit 1) as well as the seventh superceding indictment (Petitioner's Exhibit 2).

At the hearing panel level, the focus of the parties was not upon the respondent's guilt, which was established by his plea and his conviction or upon the nature of his conduct, but upon those factors which should be considered in formulating the appropriate level of discipline. To that end, the panel heard primarily from family, friends and clients of respondent who testified as to his attitude toward all of them and his achievements in law business, family and athletic endeavors. The panel also heard from an attorney, Gregory Murray, who defended a client in litigation instituted by respondent. He testified as to the circumstances under which the respondent represented clients at a hearing in federal court on November 6, 2002, despite his automatic interim suspension from practice in Michigan on October 3, 2002, and the respondent's representation to the court that until a final order was entered in his discipline case, "he could continue to wrap up matters." (5/26/04 Transcript, p 85.) On that point, the respondent testified that he thought that MCR 9.119(D) allowed him to "clean up" pending litigation after the automatic suspension. (5/26/04 Transcript, p 124.)

He learned later that that was not the case and was "sent to jail . . . about a month . . . early because of . . . that." (Id. p 125.) However, he maintained, "I went on the record [in November 2002] for less than two minutes. I didn't consider it practice of law. I didn't consider it at that time." [Id. p 126.] In its sanctions analysis, the panel discussed the applicability of ABA Standard 5.1:

> Absent mitigating factors, disbarment would generally be appropriate for the underlying conduct in this case . . . there is no question that respondent engaged in conduct that amounted to intentional interference with the administration of justice, and that such conduct would support disbarment under Standard 5.11 (Hearing panel Report p 4.)

Ultimately, the panel weighed four aggravating factors (prior discipline, existence of a pattern of misconduct and multiple offenses, disrespect for the discipline system, and substantial experience in the practice of law) against four mitigating factors (a cooperative attitude during the discipline proceedings, character and reputation, the imposition of penal sanctions, and remorse). The panel found that "[s]everal of [the] aggravating factors . . . are not as weighty as suggested" and that "the weight of mitigating factors justifies a downward departure from that sanction." (Id.) The panel ordered that the respondent's license to practice law should be suspended for 30 months, and until his reinstatement by a hearing panel, the Attorney Discipline Board or the Supreme Court under the reinstatement proceedings described in MCR 9.124. The panel also ordered the respondent to successfully complete the professional enhancement workshop offered by the State Bar of Michigan.

II. Standard of Review

Respondent cites Grievance Administrator v George G. Krupp, ADB Case No. 96-287-GA (2002) for the proposition that the Board must uphold the panel unless its determination as to sanctions was clearly erroneous. While there is phraseology in that opinion which might be viewed as support for a "clearly erroneous" standard, ample other case law makes clear that, as a general rule, the Board is not necessarily constrained to give great deference to a panel's ultimate decision as to the appropriate level of discipline. Rather, the Board has stated,

> While the Board affords a certain level of deference to a hearing panel's subjective judgment on the level of discipline, the Board possesses, of necessity, a relatively high measure of discretion with regard to the appropriate level of discipline. Grievance Administrator v James H. Ebel, ADB Case No. 94-5-GA (1995), citing Grievance

> Administrator v August, 438 Mich 296, 304(1991); Matter of Daggs, 411 Mich 304, 381 (1981).[1]

Such discretion allows the Board to carry out what our court has described as the Board's "overview function of continuity and consistency in discipline imposed." State Bar Grievance Administrator v Williams, 394 Mich 5 (1995). Moreover, it could be argued that since the issuance of a decision in Grievance Administrator v Lopatin, 462 Mich 235; 612 NW2d 120 (2000), the Board's scrutiny on review of sanctions determination is somewhat more robust in light of the Board's own duty under Lopatin to use the American Bar Association's Standards for Imposing Lawyer Sanctions.

III. Applicable Standard for Imposing Lawyer Sanctions

In the instant case, the hearing panel found, and the respondent conceded[2] that the misconduct established respondent's judgment of conviction falls within the purview of ABA Standard 5.11:

> 5.11 Disbarment is generally appropriate when:
>
> a. A lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; with intentional killing of another; or an attempt, conspiracy or solicitation of another to commit any of these offenses; or
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> b. A lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyers fitness to practice.

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[1] This is not to say that the Board should not afford a high degree of deference to a hearing panel's factual finding as to a factor which is a component part of the ultimate sanction decision. For example, in a recent order affirming a hearing panel's finding that a respondent's state of mind with regard to his mishandling of client funds was something less than "knowing conversion," we deferred to the hearing panel's considered decision on that point because it rested to a great extent upon the credibility of the witnesses before the panel and because the Supreme Court has held that the credibility of the witnesses and the weight to attach to each person's testimony is for the panel to determine. Grievance Administrator v Dennis W. Reid, ADB Case No. 03-137-GA, ADB order affirming hearing panel order of suspension, May 12, 2005.

[2] Respondent's responsive brief, February 15, 2005, p 7.

In its report, the hearing panel started its sanctions analysis with Standard 5.1:

> Absent mitigating factors, disbarment would generally be appropriate for underlying conduct in this case . . . There is no question that respondent engaged in conduct that amounted to intentional interference with the administration of justice and that such conduct would support disbarment under Standard 5.11. (Hearing panel report, p 4.)

At the review hearing conducted before the Board on May 19, 2005, the respondent's counsel argued that the sanction analysis in this case should more properly begin with Standard 5.12, which holds that suspension is generally appropriate when a lawyer engages in criminal conduct which does not contain the elements listed above in Standard 5.11. Nevertheless, we agree with the hearing panel that there is "no question" that respondent engaged in conduct that amounted to intentional interference with the administration of justice and that such conduct is serious criminal conduct as described in Standard 5.11(a). Furthermore, we have little difficulty concluding the respondent's conduct also falls under Standard 5.11(b)'s enumeration of intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. Having affirmed the hearing panel's adoption of ABA Standard 5.1 as the benchmark for consideration under the Standards, our consideration of the panel's decision to impose discipline less than revocation must turn to a review of the mitigating factors which would warrant such a downward departure.

IV. Mitigating and Aggravating Factors

As noted above, the panel in the instant case listed four mitigating and four aggravating factors. Specifically, the panel found:

> Turning to the fourth factor, the parties have presented both aggravating and mitigating factors. We agree that the following facts aggravate the disciplinary level:
>
> 1. Respondent has prior disciplinary offenses on his record, including (a) abandonment of a client, for which he was reprimanded in 1997 and then suspended until he paid costs, (b) failure to treat the parties with courtesy and respect, for which he was admonished in 2000, and (c) lack of diligence concerning a client's case, lack of communication with that client, and lack of candor in responding to the grievance, for which he was admonished in

1993. [ABA Standard 9.22(a), prior disciplinary offenses.]

2. Respondent displayed a pattern of misconduct and multiple offenses in the creation of several pleadings to which he affixed the other attorney's name. [ABA Standards 9.22 (c) and 9.22 (d).]

3. Respondent displayed a disrespect for the disciplinary process by appearing in federal court on a matter following his automatic suspension in this case (Hearing of 4-26-04, T. 78-100), remaining as attorney of record in a state case after notice of his automatic suspension (Hearing of 5-26-04, Petitioner's exhibits 4 & 5), and sending correspondence to clients suggesting that he could complete matters for a "period of time" following suspension. [ABA Standard 9.22(e).]

4. Respondent has substantial experience in the practice of law, having practiced more than twenty years, and should have been well aware that his conduct was improper. [ABA Standard 9.22(I).]

In mitigation, we find the following factors:

1. Respondent displayed a cooperative attitude during these proceedings by accepting responsibility for his conduct and pleading guilty in federal court. [ABA Standard 9.32(e).]

2. Respondent presented considerable evidence through witnesses as to his good character, revealing him to be a mentor, coach, and generous benefactor to many. He is a positive role model to many in the community, particularly in light of his inspiring comeback from serious injuries (Hearing of 4-26-04, passim). [ABA Standard 9.32(g).]

3. Respondent has paid a heavy price for the conduct at issue, as he was sentenced to both

> 21 months in federal prison and a $10,000 fine. [ABA Standard 9.32(k).]
>
> 4. Respondent has expressed remorse for his conduct (Hearing of 4-26-04. T. 133). [ABA Standard 9.32(l).] (Hearing Panel Report June 14, 2005, pp 3-4.)

Standard 9.0 of the ABA Standards lists aggravating and mitigating circumstances, described as factors that may justify an increase or decrease in the degree of discipline to be imposed. As the Board noted in its memorandum opinion in Grievance Administrator v Che Karega, ADB Case No. 00-192-GA (2004), ABA Standards 9.22 and 9.32 list factors, which "may" be considered in aggravation, not factors which "must" be considered in every case. After noting that it would not necessarily be error for a hearing panel to conclude that a factor listed in Standard 9.22 [or Standard 9.32] should be afforded little or no weight under the circumstances of a particular case, the opinion continued:

> Furthermore, it must be recognized that all aggravating (or mitigating factors) are not created equal. First there are some aggravating factors which will generally warrant greater consideration than others. Secondly, the same aggravating or mitigating factor may warrant different degrees of consideration from case to case, depending upon the facts and circumstances of each case. Karega, supra, p 10.

As an example of the first phenomenon, the Board cited the example of an attorney's "substantial experience in the practice of law" [Standard 9.22(I)] as a factor which could be expected to be afforded less weight in most cases than the presence of prior disciplinary offenses [Standard 9.22(a)] or the attorney's pattern of misconduct [Standard 9.22(c)].

As to the second point, the Board explained that,

> [T]he mitigating effect of certain factors identified in Standard 9.32 may be sufficient to warrant a decrease in the level of discipline in a case involving relatively minor misconduct while the same mitigating factor may not warrant consideration of any discipline less than revocation in cases involving "the capitol offenses" of lawyer discipline, such as intentional theft of client funds held in trust or deliberate presentation of a forged document during a proceeding. (Karega, supra, p 11.)

The Board offered a similar observation in Grievance Administrator v Arnold M. Fink, (after remand) ADB Case No. 96-181-JC (2001). That case involved the appropriate application of the

ABA Standards where the respondent pled guilty to the misdemeanor offense of assault and battery for shoving opposing counsel at a deposition. In that case, the Board considered the criminal penalties imposed upon respondent to be a mitigating factor, but cautioned,

> The Standards do not dictate precisely what weight should be given to aggravating or mitigating factors. Rather, consistent with their intent to permit "creativity and flexibility in assigning sanctions in particular cases," the call for "consideration of the appropriate weight of [all relevant] factors in light of the stated goals of lawyer discipline." (Fink, supra, p 10.)

We do not disagree with the hearing panel's conclusion that the aggravating and mitigating factors cited in its report have evidentiary support in the record and are entitled to consideration. However, we differ from the panel in our assessment of the relative weight to be given to those factors. In short, we do not agree with the panel's conclusion that the weight of the mitigating factors here justifies a significant downward departure from the sanction of disbarment which is recommended in the ABA Standards.

We do not believe that this attorney's plea of guilty in federal court, or the fact that he was sentenced to 21 months in federal prison and a $10,000 fine, constitute mitigation of an exceptional or compelling nature. We believe we may take notice that criminal defendants charged with serious felonies in the federal justice system often enter guilty pleas and often pay a heavy price for their criminal conduct. As we stated in Fink, supra,

> In our view, penalties associated with conviction do not always mitigate the sanction we would otherwise consider appropriate. For example, crimes such as embezzlement or fraud may carry heavy penal sanctions designed to serve the ends of the criminal justice system and yet virtually always also result in lengthy suspensions or disbarment in order to protect the public, the courts and the legal profession.

In Fink, we considered the respondent's apparent lack of danger to the public and noted that the counseling ordered by the probation department as part of his criminal sentence could be considered in our decision to impose a reprimand in the discipline forum. By contrast, the respondent's criminal contempt in the instant case does appear to fall into that category described in Fink as requiring condemnation by the profession, notwithstanding the imposition of penal sanctions.

Furthermore, we do not doubt that the respondent enjoys a good reputation among his family, friends and professional colleagues, nor do we doubt that he is remorseful. As we discussed in

Karega, supra, however, these are the types of mitigating factors which are generally afforded relatively less weight in cases involving fundamentally dishonest conduct.

Moreover, the mitigating effect of these combined factors is balanced, if not outweighed, by a single aggravating factor identified by the panel - the respondent's prior misconduct, which includes a reprimand in 1997 for abandonment of a client; an admonishment in 2000 for failure to treat parties in the legal system with courtesy and respect; and an earlier admonishment in 1993 for conduct which included a lack of diligence, a lack of communication with a client and a lack of candor in responding to a grievance.

V. Precedent of the Board

In its opinion directing the Board to adopt the ABA Standards, the Court said:

> We caution the ADB and hearing panels that our directive to follow the ABA Standards is not an instruction to abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the ADB or a hearing panel determines that the ABA Standards do not adequately consider the effects of certain misconduct, do not accurately address the aggravating or mitigating circumstances of a particular case or do not comport with the precedent of the court or the ADB, it is incumbent on the ADB or the hearing panel to arrive at, and explain the basis for, a sanction or result that reflects this conclusion. [Lopatin, supra, at 248, fn 13.]

For the reasons aptly stated in the hearing panel's report, cases[3] cited by the respondent to the panel for the proposition that a reprimand or short suspension may be an appropriate sanction when an attorney has signed the name of another attorney without proper authorization are distinguishable, both as to the essential nature of the conduct involved and the unique mitigating and aggravating factors presented in those cases.

While the cases considered by the panel involving suspensions ranging from 30 to 48 months following convictions for tax evasion [Grievance Administrator v Deday Larene, ADB Case No. 94-82-JC (1995)]; money laundering [Grievance Administrator v David Foster, ADB Case No. 92-202-JC (1995)]; and money laundering Grievance Administrator v Angelo Polizzi, ADB Case No. 95-69-JC (1996) do provide some guidance as to the range of discipline imposed pre-Lopatin following certain felony convictions, we believe those cases are distinguishable as well. We note for example

[3] e.g. Grievance Administrator v Williams, 03-80-GA; Grievance Administrator v Randa, 03-21-GA; Grievance Administrator v Knerly, DP 172/84; and Matter of Donald A. Edwards, DP 50/80.

that, unlike respondent Dorsey, none of those attorneys had a previous history of public discipline; none of those cases involved the aggravating effect of the respondent's disrespect for the disciplinary process and none of those cases involved the type of direct interference with the administration of justice as was demonstrated in the instant case by respondent's filing of pleadings in the name of another attorney.

VI. Conclusion

The respondent was convicted of serious criminal conduct - serious as that term is used in ABA Standard 5.11 and serious as that word would be commonly understood by members of the public and the legal profession in weighing the extent to which that conduct calls for the most severe disciplinary sanction. As the commentary to Standard 5.11 notes, a lawyer who engages in the illegal acts enumerated in that Standard, and present in this case, "has violated one of the most basic professional obligations to the public, the pledge to maintain personal honesty and integrity." Citing an opinion from our Supreme Court involving a lawyer convicted of federal income tax evasion and subornation of perjury, the commentary to that Standard continues, "we cannot ask the public to voluntarily comply with the legal system if we, as lawyers, reject its fairness and application to ourselves." In the matter of Grimes, 414 Mich 483, 326 NW2d 380 (1982). In this case, the respondent violated his pledge to maintain not only his personal honesty and integrity, but his pledge to maintain professional honesty and integrity as an officer of the court. We do not believe that there are sufficient mitigating factors in the record to warrant the imposition of discipline less than revocation in this case.

Board members William P. Hampton, Marie E. Martell, Ronald L. Steffens, George H. Lennon, Billy Ben Baumann, M.D., Lori McAllister and Hon. Richard F. Suhrheinrich concur in this decision.

Board members Theodore J. St. Antoine and Rev. Ira Combs, Jr., did not participate in the argument or decision in this case.